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No. 82-1806

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAWAIIAN INDEPENDENT REFINERY, INC.,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY

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The memorandum in opposition relies on previously rejected concepts of what constitutes sufficient control to determine whether the taxpayer "completed construction of" or "acquired" an improvement. The government does not dispute that the petitioner did not prepare the basic plans, designs, or working drawings, nor construct the facilities or supervise or direct any construction, nor inspect the construction work, except after hours and on weekends when no construction activities were taking place.

Yet the government asserts (p. 5) that the petitioner controlled the design of the facility and the details of its construction, listing the following factors:

a. Selection of prime contractor (the usual procedure).

b. "Veto power" (never exercised) over subcontractors and vendors.

c. Purchase of construction equipment, material and supplies (all purchase orders were prepared by independent engineers and contractors).

d. "Control" over contract plans and specifications at every stage (extent of "control" not specified; never more than "general or limited").

e. Inspection several times each week (after hours and on weekends, never during construction activity).

f. Final inspection (the usual "punch list").

The government's general assertions confuse and disregard the clear guidelines of prior decisions. Precise analysis is avoided.

The prior decisions of the court of claims and the court of appeals for the tenth circuit define the tests ignored in this case. An owner may describe in detail what it wants the engineers and contractors to construct without being deemed the party completing construction. See *Public Service Company of New Mexico v. United States*, 431 F.2d 980 (10th Cir. 1970) at pages 982-4; *Lykes Bros. Steamship Co. v. United States*, 206 Ct.Cl. 354, 513 F.2d. 1342 (1975) at pages 1346-7, 1350-4; and *Pacific Far East Lines v. United States*, 206 Ct.Cl. 378, 513 F.2d 1355 (1975) at pages 1359-60.

Those decisions rejected what the government now urges. The courts held:

a. Independent contractor status of the actual builder is important (court of claims); it may be determinative (tenth circuit).

b. The party responsible for actual construction is the builder; the distinction is based on who performs the work.

c. General description of what is needed; or general or limited control over contract plans and specifications is insufficient to establish the control necessary to find that the property was constructed by the taxpayer.

d. Even custom construction to suit the taxpayer's needs does not make the taxpayer the builder.

e. The critical factors are who prepared the working drawings and who performed the actual day to day construction.

f. The degree and circumstances of inspection may be important.

g. The prime contractor responsible for the work of subcontractors is the builder.

h. The inadequacy of the taxpayer's staff or ability to design or build the refinery is an important factor.

i. The taxpayer's assumption of risk of loss and acquiring builder's risk insurance does not make it the builder.

j. The taxpayer's purchase of and taking title to parts and equipment prior to completion of construction does not make it the builder.

k. Startup determines when the taxpayer acquires the property; not whether it constructed it.

The record in this case demonstrates that the petitioner never had the detailed control over working plans and day to day construction noted in the three decisions.

The government memorandum (p. 6, note 2) advances a windfall and reliance argument, contrary to *Lykes*, at p. 1353; *Public Service Co.*, at p. 982; and Regulation, § 1.48-2(c), Example (3), which determines "when property is acquired." See Regulation, § 1.50-1(c). Footnote 2 disregards the primary reason for restoration of the investment credit, "a means of providing stimulus to the lagging economy by reducing the cost of capital to U.S. manufacturers." See H. Rep. No. 533, 92nd Cong., 1st Sess., 17 (1971).

The government's attempted distinction (p. 6, n. 2) of *Public Service Co.* on the relative degree of control is contrary to the record in this case and the language of that case (431 F.2d at pp. 982-4). The government's argument (p. 6, n. 3) about

conflicts between circuits disregards the conflict with *Public Service Co.*

For the reasons set forth in the petition and herein, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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